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Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?

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I. INTRODUCTION

After decades of economic decline and rising unemployment, Latin American countries are establishing regimes that are unreceptive to the influence of American multinational corporations.[1] As this anti-transnational business mentality becomes institutionalized in Latin American governments, motions to dismiss on *forum non conveniens* (FNC) grounds should be less attractive to U.S. corporations being sued in U.S. courts for alleged torts committed abroad against foreign plaintiffs.

Yet, the opposite appears to be true. In fact, many corporate defendants sued in the United States continue to move for dismissal on FNC grounds, whereupon plaintiffs have no choice but to pursue their case in the courts of their home country, if those courts can legally assert jurisdiction.[2] Even if plaintiffs are successful in the Latin American court, defendants may still escape liability by thwarting the

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1. Consider, for example, the December 2006 re-election of Hugo Chavez, who is openly antagonistic to the U.S., the November 2006 election of the former Sandinista Daniel Ortega as the president of Nicaragua, and the December 2005 election of Evo Morales in Bolivia.

2. Professor Dante Figueroa points out the difficulty in pursuing a U.S.-dismissed case in a Latin American court. *See* Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119 (2005). Under the law of most Latin American countries, once a plaintiff has decided to sue a U.S. defendant in the court of the defendant's domicile, the Latin American court has lost its right to hear that case. *Id.* at 151. As a result, Latin American courts have refused to hear cases re-filed by plaintiffs after FNC dismissals by U.S. courts, with such dismissals typically taking place after many years of jurisdictional litigation. *Id.*

See infra Part III for further discussion of these issues.

enforcement proceeding in the United States if they can successfully argue that the case was not fairly litigated in the foreign forum. Alternatively, defendants may attempt to launch a collateral attack via international arbitration. After several rounds of this "boomerang litigation,"[3] in which the merits of the case are never actually tried, the plaintiff may ultimately be barred from recovery.

In the interest of maximizing judicial resources, corporate accountability, and comity, federal courts should first examine whether a Latin American court is prepared to assume jurisdiction over a case originally brought in the United States. In judgment enforcement actions for cases previously dismissed on FNC grounds and moved to Latin American courts, U.S. courts should assert jurisdiction and estop defendants from arguing the Latin American court was unfair. An exception to this rule would apply when the legal process provided to defendant by the foreign forum falls well below the standard that would be acceptable to a court making the FNC determination in the first place. When this occurs, the case should proceed on its merits in the U.S. court.

This article first examines the effects of FNC dismissals on several lawsuits brought in the United States by foreign plaintiffs against U.S. companies. It will then show how several Latin American countries have responded to FNC dismissals through blocking statutes and other jurisdictional legislation with the intent to keep U.S. courts from dismissing such lawsuits, thereby allowing U.S. defendants to deny foreign plaintiffs their day in court. The article will also discuss how, in practice, boomerang litigation permits defendant U.S. companies to avoid adverse judgments and undermines the policies behind FNC dismissal by straining judicial resources. Finally, this article proposes a more effective process for U.S. courts to follow, which maximizes judicial resources and offers injured plaintiffs a better opportunity for justice.

II. FNC DISMISSALS IN BANANA WORKERS' CASES

Boomerang litigation often arises out of unfortunate situations. For example, banana plantation workers exposed to the pesticide di-

3. The term "boomerang litigation" is used in this article to refer to a case that returns to a forum from which it was previously dismissed.

bromochoropropane (DBCP),[4] which allegedly left them sterile, brought claims against the pesticide manufacturer. These lawsuits, a significant source of boomerang litigation, demonstrate how FNC dismissals severely complicate the litigation process for foreign plaintiffs.

In one of the earliest Banana Cases, *Alfaro v. Dow*,[5] the Texas Supreme Court, in contrast to other states, held that FNC had been statutorily abolished.[6] In 1993, however, the state legislature instituted Section 71.051 of the Civil Practice and Remedies Code, which overruled *Alfaro* and allowed for dismissal on FNC grounds.[7] As a result, injured banana workers from Latin America, West Africa, and the Philippines have continued to file cases in U.S. courts, but with nothing to bar FNC motions, many of these cases have been dismissed.

In another noteworthy DBCP exposure case, *Patrickson v. Dole*, workers filed a class action lawsuit against pesticide manufacturers in a Hawai'i state court.[8] The action was subsequently removed to federal court under the Foreign Sovereign Immunities Act (FSIA) due to the apparent involvement of a foreign sovereign in the case.[9] The federal district court dismissed the action on FNC grounds.[10] The Ninth Circuit Court of Appeals[11] overruled the district court, not because FNC dismissal was improper,[12] but because the original removal to federal court based on FSIA was incorrect. The Ninth Circuit found the defendant Dead Sea Bromine Company was only par-

4. DBCP was banned in the United States after studies linked exposure to the pesticide to sterility in U.S. workers. Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 96–97 (Austin Sarat & Stuart Scheingold eds., 2001).

5. Alfaro v. Dow Chem., 751 S.W.2d 208 (Tex. App. 1988).

6. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990).

7. In 2003, H.B. 4 tightened the 1993 law by applying the same standard for dismissal to both citizens and non-citizens of the United States and changing the prior permissive terminology of "may" to "shall." 1993 Tex. Gen. Laws 10, 10–12 (amended 2003).

8. Patrickson v. Dole, No. 97-01516 (D. Haw. 1998).

9. *Id.*

10. *Id.*

11. Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001).

12. The standard for an appellate court to set aside an FNC dismissal by a district court is that of abuse of discretion in granting the FNC dismissal. *See* Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996); *In re* Smith Barney, Inc., 975 S.W.2d 593, 600 (Tex. 1998).

tially and previously owned by the state of Israel and, thus, did not have "foreign sovereign" status.[13]

The case eventually made its way to the U.S. Supreme Court.[14] Rather than using the opportunity to clarify FNC analysis,[15] the Supreme Court limited certiorari to the FSIA issue.[16] The Court

13. *Patrickson*, 251 F.3d at 806–08.

14. Dole Food Co. v. Patrickson, 538 U.S. 468 (2003).

15. Professor Martin Davies presents an analysis of circuit splits on a wide array of FNC issues. *See* Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 352–53 (2002).

Some courts consider whether the United States' judgment is enforceable abroad, *see, e.g.*, Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1233 (2d Cir. 1996) (concerning enforcement of a U.S. judgment in Great Britain), while other courts consider whether a judgment acquired in the alternative jurisdiction would be enforceable in the United States, *see, e.g.*, Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 836 (5th Cir. 1993) (involving a German judgment in the United States).

The Fifth, Eleventh, and D.C. Circuits do not consider the public interest factors at all if the private interest factors indicate that the case should be dismissed, while all the other circuits give equal weight to each category. Some courts consider the burden on a local jury justified as long as there is any substantial connection between the controversy and the forum. *See, e.g.*, Helmer v. Doletskaya, 393 F.3d 201, 203 (D.C. Cir. 2004). Others add to this analysis a comparison of the interests of the foreign forum. *See, e.g.*, SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1101–05 (11th Cir. 2004). With respect to docket congestion, some courts make comparative analyses as in § 1404 cases, while other courts only consider the absolute congestion of their own court dockets. *Compare* Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 609 (10th Cir. 1998) (considering the court's own congestion as a dispositive factor) *with* Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 613 (3d Cir. 1991) (comparing the court's own backlogged docket to that of Germany).

Courts also vary on the application of treaty provisions. *Compare* Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. *(In re* Air Crash Disaster*)*, 821 F.2d 1147, 1160-62 (5th Cir. 1987) (holding that the Warsaw Convention venue provisions do not prohibit dismissal on FNC grounds) *with* Hosaka v. United Airlines, Inc., 305 F.3d 989, 1004 (9th Cir. 2002) (holding that the Warsaw Convention preempts use of FNC). Courts have also differed on the presumption afforded to a foreign plaintiff's choice of forum. *Compare* Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) (requiring a defendant to make a clear showing of facts, which establish such oppression and vexation of defendant as to be out of proportion to plaintiff's convenience) *with* Iragorri v. United Techs. Corp., 274 F.3d 65, 71–72 (2d Cir. 2001) (embracing a sliding scale of presumptions dependent upon the plaintiff's motives for choosing the U.S. forum).

Similarly, courts are inconsistent in analyzing the availability of an alternative forum in a foreign state. *Compare* Bhatnagar v. Surrendra Overseas, Ltd., 52 F.3d 1220, 1227 (3d Cir. 1995) (noting that delays of a few years are of no legal significance in the FNC calculus, while delays of up to thirty-five years make FNC dismissal inappropriate) *with* Leon v. Millon Air, Inc., 251 F.3d 1305, 1311–12 (11th Cir. 2001) (treating delay as irrelevant to the alternative forum determination and instead considering it as part of the ultimate convenience analysis).

16. Dole Food Co. v. Patrickson, 536 U.S. 956, 958–60 (2002).

upheld the Ninth Circuit decision,[17] which had instructed the U.S. district court to remand the case back to the state court.[18] Since the Supreme Court's decision in *Patrickson*, several plaintiffs in similar lawsuits against Dole have had their cases remanded to state courts.[19]

Because the issue of FNC was not precluded in *Patrickson v. Dole*, it may yet be raised in the Hawai'i state court.[20] In the meantime, ten plaintiffs acting upon the dismissal from the federal district court have filed suit in their home countries.[21] A 1998 suit in Guatemala was served on a corporate defendant in March 2001, but no defendant has been required to answer.[22] As of 2004, suits in the other countries still had not been served and no discovery had taken place on the individual claims of the plaintiffs (as required by the dismissing U.S. court).[23] As of 2005, the Hawai'i state court had still not officially received the case on remand,[24] and even near the close of 2007, the situation remained unchanged.

If on remand the state courts dismiss the foreign plaintiffs' suits on FNC grounds, they will face yet another challenge: blocking statutes.

17. *Patrickson*, 538 U.S. at 480.

18. *Patrickson*, 251 F.3d at 808–09.

19. Dole Food Co. Inc, *Quarterly Report Form 10-Q* (June 19, 2004), *available at* http://www.secinfo.com/dsvRm.15qw.htm.

20. However, the Ninth Circuit implied that plaintiffs' claims raised serious questions concerning the application of FNC under federal and state law. *Patrickson*, 251 F.3d at 801 n.3.

21. *American Vanguard: High Court Yet to Rule on Writ of Certiorari*, 6 CLASS ACTION REPORTER, No. 22 (Feb. 2, 2004), *available at* http://bankrupt.com/CAR_Public/040202.mbx.

22. *Id.*

23. *Id.*

24. *Amvac Chemical Continues To Face Foreign Field Workers' Lawsuit*, 7 CLASS ACTION REPORTER, No. 80 (Apr. 25, 2005), *available at* http://bankrupt.com/CAR_Public/050425.mbx.

III. BLOCKING STATUTES

A. Past and Present Jurisdictional Limitations in Latin American Countries

FNC is a creature of common law and generally has no place in the civil law of Latin American countries.[25] In Honduras, for example, once a lawsuit is filed in a court with jurisdiction, such jurisdiction cannot be changed by a supervening event.[26] In Costa Rica, a court has jurisdiction only where: (1) the defendant is domiciled in Costa Rica, (2) the obligation must be performed in Costa Rica, or (3) the action originates from a fact that occurred in or is practiced in Costa Rica.[27] When two or more courts have jurisdiction over a case, the case is tried by the court that hears it first at the plaintiff's request.[28] Many Latin American countries have ratified the Bustamante Code, which likewise accords sole jurisdiction to the first court hearing a case.[29]

25. *See, e.g.*, Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L.REV. 493, 496–97 (Jan.1987) ("The doctrine of forum non conveniens is not part of the civilian tradition."); Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 126 n.27 (Fall 2000) ("[F]orum non conveniens is anathema to civilian lawyers.").

26. Ley de Organización y Atribuciones de los Tribunales [Law of Organization and Powers of the Courts] art. 138, *available at* http://www.cejamericas.org/doc/legislacion/ley_hond_atrib.pdf.

27. Código Procesal Civil [Code of Civil Procedure] art. 46, *available at* http://www.asamblea.go.cr/BIBLIO/leyes.htm (follow "codigo procesal civil" hyperlink).

28. *Id.* at art. 31.

29. *See* BUSTAMANTE CODE 42 (Julio Romañach, Jr. ed. & trans., Lawrence Publishing Co. 1996). Specifically, Article 318 of the code provides:

> Jurisdiction to hear all matter to which the exercise of civil and commercial actions gives rise shall lie, first of all, in the court to which the litigants submit themselves, expressly or tacitly, provided that at least one of them is a national of the contracting State to which the judge belongs, or has his domicile therein, unless local law provides otherwise. The judge competent in the first place to take cognizance of suits arising from the exercise of civil and commercial actions of all kinds shall be the one to whom the litigants expressly or impliedly submit themselves, provided that one of them at least is a national of the contracting State to which the judge belongs or has his domicile therein, and in the absence of local laws to the contrary.

Id. Article 323 also provides that, unless a court submits to jurisdiction or local law dictates otherwise, "jurisdiction to try personal actions" shall vest in the following courts: "1) The

Perhaps finding that their civilian principles have been ignored by U.S. courts, some Latin American countries have augmented their jurisdictional rules with "blocking statutes." These statutes deny native courts jurisdiction over claims first brought in the United States, thus blocking the effects of FNC by rendering the Latin American court an unacceptable forum.[30] Latin American countries hope to force U.S. courts, which have far more resources than their Latin counterparts to handle mass torts, to assert and retain jurisdiction over the case. Costa Rica,[31] Guatemala,[32] Ecuador,[33] the Dominican Republic,[34] and Nicaragua[35] have all drafted or enacted blocking statutes.

In 1997, the Costa Rican legislature proposed a blocking statute specifically directed against FNC.[36] The proposed law concerned cases filed abroad by national-plaintiffs, but then dismissed when the foreign court declined jurisdiction. It would have extinguished the Costa Rican court's jurisdiction upon the filing of a personal action by a national-plaintiff before a foreign court with jurisdiction.[37] Jurisdiction could be restored if the Costa Rican plaintiff freely chose to file the case in Costa Rica and expressly stated a desire to be sub-

court of the place of performance of an obligation, and 2) The court of the domicile of the defendants and, subsidiarily, the court of their place of residence." *Id.* at 43.

30. Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 22 (2004).

31. *See* Expediente No. 12.655, Ley de Defensa de los Derechos Procesales de Nacionales y Residentes [Proposal for the Law of Defense of Procedural Rights of Citizens and Residents], Asamblea Legislativa de Costa Rica (1997), *available at* http://www.iaba.org/LLinks_forum_non_Costa_Rica.htm.

32. Law of the Defense of Procedural Rights of Nationals and Residents (1997), *available at* http://www.iaba.org/LLinks_forum_non_Guatemala.htm.

33. Interpretive Laws of Articles 27, 28, 29 and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction (1998), *available at* http://www.iaba.org/forum_non_Ecuador.htm.

34. Decreto 16-97, Ley de las Causas Transnacionales de la Acción (Responsabilidad por Productos) [Transnational Causes of Action (Product Liability)] (1997).

35. Draft Law for the Defense of Procedural Rights of Nationals and Residents in Nicaragua (1997). This bill was never enacted. Instead, Nicaragua enacted a blocking statute specifically aimed at defeating FNC dismissals in DBCP cases. *See* Ley 364, Special Law to Process Lawsuits Filed by People Affected by the Use of Pesticides Manufactured with DBCP (2000).

36. Proposal for the Law of Defense of Procedural Rights of Citizens and Residents, *supra* note 31.

37. *Id.* at art. 47.

ject to the country's jurisdiction.[38] However, the proposal never became law.

Guatemala passed its blocking statute, the Law of Defense of Procedural Rights of Nationals and Residents of Guatemala, in 1997. The law declares FNC unacceptable and invalid because it violates a plaintiff's free will to choose a forum.[39] It provides that an action dismissed in the United States under FNC can be reinstated in Guatemala only if the plaintiff freely chooses to file it there.[40] Otherwise, Guatemalan courts lack jurisdiction. However, the law allows for jurisdiction in a Guatemalan court if a foreign judge refuses to follow the law and dismisses the case. The Guatemalan court must then apply the same types and levels of indemnification that would be afforded in substantially similar cases in the country where the lawsuit was originally established.[41]

In 1998, Ecuador passed the Interpretive Law of Articles 27, 28, 29, and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction.[42] The law provides that after a suit is filed in a foreign country, Ecuadorian courts permanently lose jurisdiction to hear the same case.[43] The Ecuadorian Constitutional Court declared this law unconstitutional.[44]

The Dominican Republic took a different approach, passing a law that accepts jurisdiction, but deters defendants from moving claims to its own courts. The 1998 Transnational Causes of Action (Product Liability) Act[45] imposes a heavy burden on the transnational defendant seeking to pursue a FNC-dismissed case in the Dominican Republic. It requires the transnational defendant to post a bond

38. *Id.*

39. Decreto 34-97, Ley de Defensa de Derechos Procesales de Nacionales y Residentes [Law of Defense of Procedural Rights of Nationals and Residents], art. 1, (1997).

40. *Id.* at art. 2.

41. *Id.* at art. 3(b). Guatemala's high court declared unconstitutional Article 3(a) of the law, which required defendants without significant property in Guatemala to deposit a bond in the amount of damages claimed, including fees and expenses of the original proceeding. DAHL'S LAW DICTIONARY 218–40 (3d ed. 1999).

42. Ley 55, Ley Interpretativa de Los Artículos 27, 28, 29 y 30 del Código de Procedimiento Civil para los Casos de Competencia Concurrente Internacional [Law Interpreting Articles 27, 28, 29, and 30 of the Code of Civil Procedure Providing for Concurrent International Jurisdiction], 247 R.O. Supp. (1998).

43. *Id.*

44. DAHL'S LAW DICTIONARY 218–40 (3d ed. 1999).

45. Transnational Causes of Action (Product Liability), *supra* note 34.

equivalent to 140% of the amount proven by plaintiff to have been awarded in similar foreign proceedings.[46] Moreover, the Act imposes strict liability for foreign defendants in product injury liability cases[47] and allows courts to award punitive damages and to force other forms of redress upon defendants.[48] The Act further provides that the amount of compensatory damages must be determined under the same standards used by U.S. courts.[49] Finally, this legislation had retroactive effect on all actions pending at the date it entered into force.[50]

Nicaragua's Ley 364,[51] which only applies to plaintiffs allegedly harmed by exposure to DCBP, follows a similar approach to the Dominican Republic. At the initiation of the suit, foreign defendants are forced to post a $100,000 bond to pay for court costs and to guarantee the payment of a final judgment.[52] Within ninety days of service, defendants must deposit an additional $20 million. Article 9 sets forth the acceptable forms of proof; Article 11 establishes the minimum amount of damages to which injured plaintiffs are entitled; and Article 13 guarantees legal assistance for those who cannot afford it.

In sum, all of the countries discussed have proposed or enacted blocking statutes to try and force U.S. courts to reconsider the use of FNC in transnational litigation. By precluding their courts from hearing cases dismissed in foreign courts, these countries hope to reduce the chance that cases will be dismissed through FNC. Blocking statutes send the message to U.S. courts that if transnational cases are dismissed, the foreign national-plaintiff may never have relief.

46. *Id.* § 5.

47. *Id.* § 8.

48. *Id.* § 11.

49. *Id.* §§ 2, 12(1).

50. *Id.* § 15.

51. Ley Especial Para la Tramitación de Juicios Promovidos Por Las Personas Afectadas Por el Uso de Pesticidas Fabricados a Base de DBCP [Special Law to Process Lawsuits Filed by People Affected by the Use of Pesticides Manufactured with DBCP], La Gaceta [L.G.], 12 (2001).

52. *Id.* at arts. 4–5.

B. Effects of Blocking Statutes on FNC Analysis in U.S. Courts

At least one U.S. court presiding over a banana workers' case has considered the lack of jurisdiction asserted by Latin American courts. In *Canales Martinez v. Dow Chemical Co.*,[53] defendants relied on *Delgado v. Shell Oil Co.*, where the court dismissed the case on FNC grounds, in arguing that Costa Rica was "an available and adequate forum for precisely the claims presented" in their case.[54] They further asserted that the plaintiffs had "underhandedly obtained the [previous] dismissal from the Costa Rican court, when in fact, the cause of action could have been styled in such a way that the court would have accepted jurisdiction."[55] The *Canales* court nevertheless refused to grant the defendants' motion to dismiss on FNC grounds, agreeing with the plaintiffs that "Costa Rica is not available as an alternative forum, because the law in that country divests Costa Rican courts of jurisdiction over a plaintiff's claims when the plaintiff has first filed his claim in another forum with competent jurisdiction."[56] In ruling on the defendants' motion for dismissal, the court relied on Costa Rica's Code of Civil Procedure, reported cases on the subject of jurisdiction, and provisions of the Bustamante Code.[57]

However, other courts have not followed *Canales.* In *Chandler v. Multidata Systems International Corp.*,[58] the court disagreed with the plaintiffs' interpretation of *Canales* and its reasoning as support for application of the Bustamante Code.[59] The *Chandler* court noted that the *Canales* court did not mention Article 2 of the Bustamante Code, which limits its applicability to signatories.[60] Since plaintiffs failed to show that Panama's judicial or civil codes, like those of Costa Rica at issue in *Canales*, prohibited plaintiffs from re-filing the cause of action in their home country,[61] the court concluded that the

53. 219 F. Supp. 2d 719 (E.D. La. 2002).
54. *Id.* at 726.
55. *Id.*
56. *Id.* at 725.
57. *Id.* at 726–27.
58. 163 S.W.3d 537 (Mo. Ct. App. 2005).
59. *Id.* at 547.
60. *Id.*
61. *Id.*

trial court did not abuse its discretion by basing dismissal of the case, in part, on a finding that "Panama is an available forum."[62]

In addition, the *Morales v. Ford Motor Co.*[63] court rejected the *Canales* court's reliance on the Costa Rican Code of Civil Procedure. The *Morales* court stated that the applicability of Articles 122 and 477, each of which specifies that parties cannot be forced to bring lawsuits, was not self-evident from the analysis of the *Canales* opinion.[64] In fact, the *Morales* court noted that both the *Canales* plaintiffs and the *Morales* plaintiffs had already voluntarily brought suit: "The relevant question raised by the forum non conveniens inquiry is not whether plaintiffs may be forced to sue, but rather in what forum the litigation that they have initiated should proceed."[65] The *Morales* court also refused to accept the notion that the action had originated from acts undertaken and decisions made by the defendant-companies at their highest levels, in their corporate headquarters in the United States.[66] Finally, the *Morales* court noted that the plaintiffs had not brought to the court's attention any Venezuelan legal provisions or cases equivalent to those in Costa Rica.[67]

The applicability of blocking statutes to FNC analysis will need to be resolved by the Supreme Court. In the meantime, blocking statutes may further complicate transnational litigation by sending cases that have already been dismissed from U.S. courts back to those same courts.

IV. FOREIGN JURISDICTIONAL STATUTES + FNC DISMISSALS = MORE BOOMERANG LITIGATION

As blocking statutes demonstrate, developing countries often enact legislation in order to create a mechanism for their citizen-plaintiffs to seek judicial redress for injuries suffered as employees of foreign companies. When these jurisdictional statutes are applied to cases dismissed by U.S. courts on the basis of FNC, the result is a further increase in the amount of boomerang litigation. The follow-

62. *Id.* at 548.

63. 313 F. Supp. 2d 672 (S.D. Tex. 2004).

64. *Id.* at 676 n.3.

65. *Id.*

66. *Id.* The Fifth Circuit has also rejected this same argument. *See* Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 673–74 (5th Cir. 2003).

67. *Id.*

ing case studies, drawn from Costa Rica and Nicaragua, show this interaction in practice. In Costa Rica, courts continue to deny jurisdiction for cases dismissed from U.S. courts on FNC grounds, which often results in the reappearance of these cases in U.S. courts. Meanwhile, a statute granting jurisdiction in Nicaragua courts to citizen-plaintiffs in suits against foreign companies has led to increasing boomerang litigation over the enforcement of Nicaraguan judgments in U.S. courts.

A. Costa Rica's Blocking Legislation

As with any preventative statute, the effectiveness of blocking statutes depends on the willingness of courts in the developing world to apply them. In what likely came as a surprise to U.S. courts dismissing cases on FNC grounds, many foreign courts have held their ground by denying their own citizens jurisdiction. Paradoxically, courts in the developing world that deny access to their own citizens can, in effect, grant them access to the more sophisticated system of compensation in the United States. As this jurisdictional game continues to evolve, the frequency and complexity of cases that travel between the plaintiffs' forum and the United States will only increase.

Lawsuits dismissed on FNC grounds have faced particularly difficult problems in Costa Rica, which does not recognize FNC.[68] *Delgado v. Shell Oil Co.*, dismissed by a federal district court in Texas on FNC and Federal Sovereign Immunities Act (FSIA) grounds, provides an instructive case study.[69] The Fifth Circuit Court of Appeals affirmed the dismissal in 2000.[70] Plaintiffs then appealed the FSIA portion of the ruling and moved the suit to a Costa Rican court,[71] which in turn dismissed the case for lack of jurisdiction because Costa Rica does not recognize FNC.[72] This policy effectively blocked the litigation from being considered in Costa Rica.

68. Abarca v. Shell Oil Co., No. 1011-95 (4th Civ. Ct. of San José, Costa Rica 1995).

69. *See* Delgado v. Shell Oil Co., 890 F. Supp. 1315 (S.D. Tex. 1995). This case also involved the Dead Sea Bromine Company, which was partially and previously owned by the Israeli government and, therefore, allegedly immune to suit under the Foreign Sovereign Immunities Act.

70. *See* Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000).

71. *See Abarca*, No. 1011-95.

72. *Id.* at 6, 8.

The plaintiffs filed an appeal for reversal in the Costa Rican Supreme Court, and most of the defendants filed response briefs. Chiquita Brands International, Inc., Dole, and Del Monte Fresh Produce, N.A. urged the Court not to hear the appeal on procedural grounds.[73] These defendant-corporations did not express a willingness to submit to jurisdiction in Costa Rica.[74] By contrast, Shell Oil Company's (Shell) brief stated that Shell had no objection to resolving the case in Costa Rica and actually argued in favor of Costa Rica having jurisdiction.[75]

The Costa Rican Supreme Court denied the plaintiffs' appeal and confirmed the trial court's order, dismissing the case for lack of jurisdiction.[76] With no other alternative, the plaintiffs then filed a motion for reinstatement of their claims in the Texas federal court. The court denied the motion without prejudice, electing to defer ruling on the motion until after the Fifth Circuit resolved the plaintiffs' appeal of the FSIA jurisdictional issue. The Fifth Circuit affirmed the 1995 FSIA dismissal order,[77] and the United States Supreme Court then denied certiorari.[78]

By this time, the plaintiffs had settled with all of the defendants except Dole.[79] On June 21, 2004, the Texas federal court acknowledged that it no longer had subject matter jurisdiction to consider the motion to reinstate and therefore remanded the Costa Rican plaintiffs' claims to Texas state courts,[80] which reinstated the plaintiffs' claims.[81] Dole then unsuccessfully sought mandamus from the Fourteenth Court of Appeals. The case is currently pending before the Texas Supreme Court.[82]

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73. *See* Plaintiffs' Response to Petition for Writ of Mandamus at 10, *In re* Standard Fruit Co., Nos. 06-0343 and 06-0344 (Tex.), available at http://www.supreme.courts.state.tx.us/ebriefs/06/06034401.pdf.

74. *Id.*

75. *Id.*

76. Abarca v. Shell Oil Co., No. 010-96 (Super. Ct. of Costa Rica 1996).

77. Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000).

78. Delgado v. Shell Oil Co., 532 U.S. 972 (2001), *leave to file for reh'g denied*, 537 U.S. 1229 (2003).

79. *See* Plaintiffs' Response to Petition for Writ of Mandamus at 10 in *In re* Standard Fruit Co., Nos. 06-0343 and 06-0344 (Texas Supreme Court), available at http://www.supreme.courts.state.tx.us/ebriefs/06/06034401.pdf.

80. Delgado v. Shell Oil Co., 322 F. Supp. 2d 798, 817 (S.D. Tex. 2004).

81. No. 93-0030 (212th Dist. Ct. Tex.).

82. *In re* Standard Fruit Co., Nos. 06-0343 and 06-0344 (Tex.).

There are now about 6,000 similar Costa Rican cases that have either returned to the U.S. courts on account of blocking legislation or have been stayed in U.S. courts.[83] One such case, *Borja v. Dow*,[84] is now approaching trial twelve years after it was first filed.[85] The case involves 370 plaintiffs who worked for Dole in and around the town of Rio Frio in central Costa Rica.[86] Five "bellwether cases" were randomly selected from among the *Borja* plaintiffs for trial. The cases will be used by both sides to test arguments and tactics for the trials that will follow in Texas courts and elsewhere.[87]

B. Nicaragua's Ley 364

Ley 364, a Nicaraguan statute allowing workers to sue foreign companies for damages caused by exposure to DBCP, has further complicated transnational litigation.[88] The groundwork for Ley 364 was laid in 1993, when a coalition of injured workers and environmental NGOs founded the Asociación de Trabajadores y ex Trabajadores Afectados por el Nemagón (the Association of Workers and Former Workers Affected by the Pesticide Nemagon, or ASOTRAEXDAN) to address the DBCP crisis and seek compensation for injured plaintiffs.[89]

ASOTRAEXDAN pressured the Nicaraguan government to adopt Ley 364,[90] and with parliamentary approval, Ley 364 became

83. Dee McAree, *'Bellwether' Pesticide Case Ready for Jurors*, NAT'L L. J., Mar. 7, 2005, at 6.

84. Borja v. Dow Chemical Co., No. 92-0320 (116th Dist. Ct., Tex.).

85. Rick Kennedy, *Fruit of the Poison Tree*, DALLAS OBSERVER, Mar. 10, 2005, *available at* http://www.dallasobserver.com/2005-03-10/news/fruit-of-the-poison-tree/. Plaintiffs originally filed this lawsuit in the Dallas County District Court on January 12, 1993, alleging state law claims for injuries sustained from exposure to DBCP manufactured by Dow Chemical Company, Shell Oil Company, and Occidental Chemical Corporation. This case went through the same process of removal and dismissal on FNC grounds, but the decision was vacated after the U.S. Supreme Court's ruling in *Patrickson v. Dole. See* Borja v. Dole Food Co., No. 97-308, 2003 WL 21529297 (N.D. Tex. June 30, 2003).

86. Kennedy, *supra* note 85.

87. *Id.*

88. *Agrochemicals and the Banana Workers of Nicaragua*, UPDATE NICAR. NEWSL., Mar. 31, 2003, *available at* http://www.nicaraguaphoto.com/essays/update_nicaragua Mar2003.shtml.

89. *Id.*

90. 'Ley' is the Spanish word for 'law'.

law in November of 2000.[91] However, the U.S. embassy intervened, pressuring Nicaragua's Attorney General to block enforcement of the law.[92] The Attorney General in turn submitted the law for review to the Nicaraguan Supreme Court, which found it unconstitutional in March of 2002.[93]

The Nicaraguan Supreme Court's ruling ignited the NGOs and activists in Nicaragua, who felt their democratic processes were being undermined by foreign corporate interests. Thousands of workers from around the country converged in Chinandega, the site where a majority of the injuries occurred, and from there marched for days to the capital of Managua in protest.[94] The workers gained more support in Managua, and eventually the President and members of Parliament signed Resolution 004-2002, which directs Nicaraguan courts to enforce Ley 364.[95] In October 2003, the Nicaraguan Supreme Court issued an advisory opinion, not connected with any litigation, stating that Ley 364 was indeed constitutional.[96]

In December of 2002, Judge Vida Benavente of the Third District Court in Managua relied on Ley 364 in entering a judgment of $489 million against Dole, Shell, and Standard Fruit Corporation ("Standard Fruit") in compensation for 583 injured workers.[97] According to the *New York Times*,

> The companies say they will not pay. Shell issued a statement arguing that Nicaragua's court has [sic] no jurisdiction over Shell because its headquarters are in the United States and it has no employees in Nicaragua. Dow said that the Nicaraguan law "offends virtually every notion Americans have of fair play and substantial

91. *Agrochemicals and the Banana Workers of Nicaragua*, *supra* note 88.

92. *Id.*

93. *See* Erving Sanchez Rizo, *Marcha del Nemagón llegó a Managua*, EL NUEVO DIARIO, Nov. 20, 2002, *available at* http://archivo.elnuevodiario.com.ni/2002/noviembre/20-noviembre-2002/nacional/nacional3.html.

94. *Agrochemicals and the Banana Workers of Nicaragua*, *supra* note 88.

95. *Id.*

96. Dole Food Co. Inc., *Quarterly Report Form 10-Q* (Oct. 7, 2006), *available at* http://www.secinfo.com/dR7Km.v1Bx.htm#_111.

97. Franco v. Dow Chem. Co. (3d Dist. Ct. of Nicar. 2002); *see* Luis Galeano, *Carta de Nicaragua a CIADI de Washington rechazando arbitraje,"Shell ya se sometió a juicio en Nicaragua,"* EL NUEVO DIARIO, Aug. 30, 2006, *available at* http://impreso.elnuevodiario.com.ni/2006/08/30/nacionales/27748.

> justice," adding that the company will seek to have the Nicaraguan cases retried in the United States.[98]

In December of 2003, Dole filed a $17 billion countersuit against the banana workers, the doctors who evaluated them, and their attorneys.[99] Dole filed the suit under the Racketeer Influenced and Corrupt Organizations Act (RICO) on the grounds that some of the plaintiffs had falsified their claims.[100] The banana workers responded with an organized march to Managua on February 11, 2004.[101] Victorino Espinales, the protest leader and banana worker organizer, confidently declared the workers' dedication to justice:

> We will take up our positions in front of the National Assembly, in front of the Presidential Palace and before the Supreme Court. We demand that these state institutions adopt a position in support of the workers. We will ask everyone, from the deputies to the President himself, to treat us with dignity and respect and to condemn the position adopted by these gringo companies.[102]

When workers pursued enforcement of the $489 million Nicaraguan court judgment in 2004, the California Federal District Court refused to enforce the judgment because plaintiffs' counsel failed to identify and properly serve the particular Dole corporate entity involved.[103] The Nicaraguan Supreme Court is expected to correct the

98. David Gonzalez and Samuel Lowenberg, *Banana Workers Get Day in Court*, N.Y. TIMES, Jan. 18, 2003, at C1, C3.

99. Nicaragua Network, *Dole, Shell and Dow Counter Sue Nicaraguan Banana Workers*, Feb. 6, 2004, *available at* http://www.laborrights.org/urgent/Nicaragua_nemagon_0204.htm.

100. *Nica Banana Workers Battle U.S. Multinationals—and Each Other*, Americas.org, May 1, 2004, http://www.globalexchange.org/countries/americas/nicaragua/1983.html; Nicaragua Network, *supra* note 97.

101. Nicaragua Network, *supra* note 99.

102. *Id.*

103. Franco v. Dow Chem. Co., No. 03-5094, 2003 WL 24288299, at 5–6 (C.D. Cal. Oct. 21, 2003). The complaints did not name Dole Food Company, Inc. or Shell Chemical Company as defendants. The court found that (1) Shell Chemical Company is an entirely distinct juridical entity from Shell Oil Company; (2) Dole Food Company, Inc. has never had a subsidiary named Dole Food Corporation or Dole Food Corporation, Inc.; (3) Dole Food Corporation, Inc. does not exist, and the entity that does exist, Dole Food Company, Inc., was not named as a defendant in the Nicaraguan complaints.

Unlike Dole Food Company, Inc. and Shell Chemical Company, "Dow Chemical, also known as Dow Agro Sciences" did appear as a defendant in the Judgment. The Dow Chemical Company moved to dismiss plaintiffs' claims because it was not properly served with the complaint. The court determined that there was inadequate evidence of proper service. *Id.* at 6.

ruling, and send the case back to the United States for enforcement.[104]

On January 13, 2006, the same Nicaraguan judge who handed down the $489 million judgment against the defendant-corporations ordered an embargo against various Shell enterprises in punishment for its lack of compliance.[105]

On May 17, 2006, Shell Brand International AG (SBI) and Shell Nicaragua S.A. (SN) took the case to arbitration before the International Centre for Settlement of Investment Disputes (ICSID) to determine whether it should pay the $489 million judgment, or whether Nicaragua should pay Shell the $489 million for damages to its investment in Nicaragua.[106] The ICSID ruled that the embargo must be lifted by November 20, 2006;[107] however, other issues before the ICSID are still pending.

Judge Benavente is not the only Nicaraguan judge enforcing Ley 364. In August 2005, Judge Socorro Toruño of the Second Civil District Court of Chinandega ordered Standard Fruit, Dole, Shell, Dow Chemical Company (Dow Chemical), and Occidental Chemical Corporation (Occidental Chemical) to pay $97 million to 150 injured banana workers.[108] On December 1, 2006, the same judge awarded more than $804 million to another group of 1,701 banana workers.[109] In response to this order, Humberto Hurtado, a spokesperson for Dole, stated that Dole would not honor the judgment

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The Court also noted that plaintiffs failed to attach a copy of the judgment to their complaint. Instead, they attached a "translated version of the Writ of Execution" that allegedly was issued on January 23, 2003. The court found that it could not enforce a writ of execution against defendants not named in the underlying judgment. *Id.* at 5.

104. Letta Tayler, *SprayFight Hits Home*, NEWSDAY, Dec. 3, 2006, at A22.

105. Valeria Imhof and Carlos Salinas, *Embargan marca Shell de Nicaragua, Histórica decisión judicial*, EL NUEVO DIARIO, Jan. 13, 2006, *available at* http://impreso.elnuevodiario.com.ni/2006/01/03/nacionales/10199.

106. Galeano, *supra* note 97.

107. Lisbeth Garcia, *Tribunal desmonta pretextos de Shell en juicio contra Nicaragua*, EL NUEVO DIARIO, Nov. 16, 2006, *available at* http://impreso.elnuevodiario.com.ni/2006/11/16/nacionales/34083.

108. Róger Olivas and Valeria Imhof, *Jueza chinandegana ordena a transnacionales pagar más de 800 millones de dólares*, EL NUEVO DIARIO, Dec. 5, 2006, *available at* http://impreso.elnuevodiario.com.ni/2006/12/05/nacionales/35648.

109. *Id.*

because the Nicaraguan courts were corrupt.[110] He claimed the judge did not permit Dole to show evidence while accepting inadmissible evidence from the other side.[111] Hurtado concluded that the court order could not be enforced in the United States because the banana workers were not injured by any pesticide manufactured by Dole[112] and because Ley 364 was unconstitutional.[113] Dole's recent quarterly report describes their position as follows:

> The Company believes that none of the Nicaraguan civil trial courts' judgments will be enforceable against any Dole entity in the U.S. or in any other country, because Nicaragua's Law 364 is unconstitutional and violates international principles of due process. Among other things, Law 364 is an improper "special law" directed at particular parties; it requires defendants to pay large, nonrefundable deposits in order to even participate in the litigation; it provides a severely truncated procedural process; it establishes an irrebuttable presumption of causation that is contrary to the evidence and scientific data; and it sets unreasonable minimum damages that must be awarded in every case.[114]

While Nicaraguan courts rely on Ley 364 in ordering U.S. companies to pay damages to injured banana workers, U.S. companies counter-argue that the Nicaraguan court process is not legitimate and, therefore, is not enforceable by U.S. courts.

Currently, in the United States and elsewhere, there are 537 lawsuits against Dole at various stages of litigation that allege injury from exposure to DBCP or seek enforcement of judgments already rendered by Nicaraguan courts.[115]

V. BOOMERANG LITIGATION: A PATTERN OF AVOIDANCE

The Banana Cases represent just one of many litigation contexts in which transnational companies have sought to avoid adverse judgments in foreign courts after getting the case dismissed from

110. Róger Olivas, *Llama corruptos a jueces nicas y niega daños del Nemagón Vocero de la Dole asegura que no pagarán a bananeros*, EL NUEVO DIARIO, Dec. 16, 2006, *available at* http://impreso.elnuevodiario.com.ni/2006/12/16/nacionales/36589.

111. *Id.*

112. *Id.*

113. *Id.*

114. Dole Food Co. Inc., *supra* note 96.

115. *Id.*

U.S. courts on FNC grounds. In another example, a group of citizens of Peru (Gabriel Jota, et al.) and of Ecuador (Maria Aguinda, et al.) brought suit against Texaco, Inc. (Texaco). The plaintiffs alleged that a subsidiary of Texaco polluted rain forests and rivers in Peru and Ecuador, which caused both environmental damage and personal injuries. [116] A U.S. federal district court dismissed the complaint on grounds of international comity, FNC, and failure to join indispensable parties.[117] After a second complaint was dismissed, the Peruvian and Ecuadorian citizens appealed. The Second Circuit Court of Appeals held that dismissal on FNC grounds was inappropriate absent a commitment from Texaco to submit to the jurisdiction of the Ecuadorian courts.[118]

After supplying additional information and consenting to suit in Ecuador and Peru, Texaco renewed its motion for dismissal on FNC grounds. The district court granted the motion,[119] and the Peruvian and Ecuadorian citizens appealed. The Second Circuit Court of Appeals determined that conditional dismissal on FNC grounds was warranted, as the Ecuadorian courts provided an adequate alternative forum and the balance of private and public interest factors weighed strongly in favor of holding trial in Ecuador.[120] The trial was held in Ecuador's Lago Agrio—a small city with a population of 35,000—and pitted 30,000 residents of Ecuador's Amazon basin against Texaco's successor company, the Chevron Corporation (Chevron), which happened to be the second largest oil company in the United States.[121] In this hostile foreign setting, Chevron's legal team suggested that any award of damages may not be enforceable on the basis of full faith and credit.[122]

In June 2004, Chevron filed for arbitration with the American Arbitration Association against Petroecuador, Ecuador's state-owned oil company.[123] Chevron asserts that the Lago Agrio case is invalid,

116. For further analysis of the events leading up to this case, see Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevron Texaco, and Aguinda v. Texaco*, 38 N.Y.U. J. INT'L L. & POL. 413 (2006).

117. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996).

118. Jota v. Texaco Inc., 157 F.3d 153, 159 (2d Cir. 1998).

119. Aguinda v. Texaco, Inc., 142 F.Supp.2d 534, 537 (S.D.N.Y. 2001).

120. Aguinda v. Texaco, Inc., 303 F.3d 470, 476–480 (2d Cir. 2002).

121. Carlyn Kolker, *Jungle Warfare*, AM. LAW., Nov. 2006, at S21.

122. *Id.* at S30.

123. *Id.*

citing a 1998 promise by Petroecuador to indemnify Texaco from all environmental liability and claims.[124] Chevron's arbitration filing alleged a breach of this agreement by Petroecuador and, by extension, the government of Ecuador. Chevron pointed to a joint venture agreement between Texaco and Gulf, another oil company, in the 1970s, arguing that Petroecuador had taken Gulf's place by signing on to the joint venture,[125] and claiming that, under the contract, arbitration is the appropriate remedy for disputes arising between the two parties.[126]

In typical boomerang fashion, Ecuador then sued to stay the arbitration in a New York state court, and the case was later removed to a federal district court.[127] Ecuador claimed that the remediation contract was the product of fraudulent negotiation tactics—that Texaco, now Chevron, misrepresented the environmental effects of the oil field operation in its negotiation with the government.[128] In June 2007, the federal judge determined that Ecuadorian law required that Chevron and Petroecuador comply with government contracting authorities, and failure by the parties to do so rendered the arbitration clause unenforceable.[129] Still, the parties continue to contest this issue, and others, in the New York federal courts.

This piece of boomerang litigation has now gone back and forth between several diverse forums, including a federal district court, a federal circuit court, an Ecuadorian trial court, the American Arbitration Association, and a New York state court. The most recent recipient, a federal district court judge in New York, now has jurisdiction over the matter; however, where the case goes from here remains to be seen.

124. *Id.* at S32.

125. *Id.*

126. *Id.*

127. *See* Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334 (S.D.N.Y. 2005).

128. Kolker, *supra* note 121, at S32.

129. Ecuador v. ChevronTexaco Corp., 499 F. Supp. 2d 452, 461–63 (S.D.N.Y. 2007). The court also found the agreement was unenforceable because: (1) the arbitration clause possibly violated the Ecuadorian constitution, *id.* at 463–65, and (2) the American company's belief that the joint operating agreement was no longer in effect also precluded enforcement of the arbitration provision. *Id.* at 466–68.

VI. POLICY CONSIDERATIONS IN BOOMERANG LITIGATION

Boomerang litigation often allows defendant-corporations to take advantage of policies supporting the rejection of foreign judgments and thus avoid adverse judgments altogether. U.S. case law strongly suggests that, to conserve judicial resources, U.S. courts are likely to dismiss most cases like those discussed above in favor of the defendants' forum of choice on FNC grounds.[130] Yet, as this Article shows, defendants who receive an unfavorable outcome in a Latin American court may then engage in forum shopping by forcing international arbitration or otherwise avoiding the foreign judgment. Unlike judgments obtained in other states,[131] U.S. courts may reject judgments obtained in foreign countries on policy grounds.[132]

Ironically, this practice actually undermines the principal policy interest behind FNC dismissal—the conservation of judicial resources. When unsuccessful in a foreign forum, a defendant may simply refuse to pay the judgment and force successful plaintiffs to bring enforcement actions in the United States. As a result, U.S. courts must devote time and resources to the readjudication of an issue that has already been decided elsewhere. To avoid this outcome, U.S. courts should assert jurisdiction over transnational claims in cases where the defendant is domiciled or has minimum contacts with the state.

The American legal tradition respects the right of plaintiffs to engage in forum shopping to some degree. For instance, plaintiffs may often choose to file in either federal or state court, and they may also have a choice within the federal or state systems. At the same time, procedures allowing for removal to federal court[133] or transfer

130. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981) ("[A] foreign plaintiff's choice deserves less deference.").

131. The Full Faith and Credit Clause requires states to recognize the valid judgments of courts in sister states. U.S. CONST. art. IV, § 1; Sunseri v. Proctor, 461 F. Supp. 2d 551, 560 (E.D. Mich. 2006); *see also* Grynberg v. Phillips, 148 P.3d 446, 450 (Colo. Ct. App. 2006). However, the Constitution is silent on the enforcement of foreign country judgments. Although Congress has the legislative authority to regulate the enforcement of foreign country judgments, it has declined to do so.

132. Dart v. Dart, 597 N.W.2d 82, 84 (Mich. 1999).

133. *See* 28 U.S.C. §§ 1331–1332, 1441 (2007). See also the Class Action Fairness Act, which amends 28 U.S.C. § 1332 (2005) and adds 28 U.S.C. § 1453 (2005), thereby allowing most class actions to proceed in federal court, rather than state court.

between federal district courts[134] can, in some cases, mitigate the plaintiff's ability to forum shop. Laws allowing for FNC dismissal and transfers between intra-state venues provide another useful check on plaintiff forum shopping.[135] Statutory regulations seek carefully to balance a plaintiff's right to forum shop with a defendant's right to prevent such action. However, forum shopping by defendants in international tort claims is unregulated.[136]

Another significant problem with FNC dismissals and forum shopping that must be addressed is the defendant's ability to prevent a successful plaintiff from collecting on a judgment, thus in effect changing forums after judgment has been rendered. As mentioned above, this trend in boomerang litigation frustrates rather than serves the policy goal to conserve judicial resources[137] underlying the application of FNC dismissals.[138] Moreover, while some courts are concerned with the docket backlogging that would result if FNC dismissals were eliminated,[139] U.S. courts are now forced to engage in both an FNC and a foreign judgment enforcement analysis of cases already adjudicated abroad. As such, it would be more in keeping with the spirit and policy of FNC if the dismissal led to *greater* deference to the foreign court judgment. Unfortunately, this rarely occurs in the practice of boomerang litigation.

134. *See* 28 U.S.C. § 1404 (2007).

135. *E.g.*, LA. CODE CIV. PRO. ANN. arts. 122–23 (2007).

136. One notable exception is the Hague Convention on the Civil Aspects of International Child Abduction, which is intended to prevent parents from engaging in international forum shopping in order to find a more sympathetic court for custody proceedings. *See* Baxter v. Baxter, 423 F.3d 363, 367 (3d Cir. 2005) ("The Convention is not designed to settle international custody disputes, but rather to ensure that cases are heard in the proper court.").

137. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947) (public policy considerations).

138. Commentators have also expressed concern regarding the economic effects on U.S. companies held liable in U.S. courts. *See, e.g.*, Mark C. Mayfield, Note, *Dow Chemical Company v. Alfaro: Aiding the Decline of the Alternative Forum*, 14 HOUS. J. INT'L L. 213, 254 n.310 (1991) (citing concerns that the lack of a forum non conveniens doctrine will have a significant negative impact on economic growth in the business community). Moreover, companies from other nations that avoid the type of damage awards seen in U.S. courts could gain a competitive advantage over U.S. companies. This is a large and separate (non-legal) topic that will not be addressed here, but it is crucial to any honest analysis of this issue.

139. *See, e.g.*, Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 707 (Tex. 1990) (Hecht, J., dissenting) ("But what purpose beneficial to the people of Texas is served by clogging the already burdened dockets of the state's courts with cases which arose around the world and have nothing to do with this state except that the defendant can be served with citation here?").

All of this raises the question: Why should Americans care whether foreign plaintiffs recover in a timely manner or at all? Justice Doggett's concurring opinion in the Texas Supreme Court's decision in *Dow Chemical Co. v. Castro Alfaro* offers several important reasons why Texans, and by extension Americans, should be concerned about corporate accountability.[140] He argues that there is a significant policy interest in retaining the ability to "evaluate the conduct of a Texas corporation concerning decisions it made in Texas" because "a wrong does not fade away because its immediate consequences are first felt far away rather than close to home."[141]

Doggett reasons that comity requires U.S. courts to hold U.S. companies accountable for torts committed abroad.[142] He notes further that "comity is best achieved by avoiding the possibility of incurring the wrath and distrust of the Third World as it increasingly recognizes that it is being used as the industrial world's garbage can."[143] Doggett adds that we live "in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet," and that "actions of our corporations affecting those abroad will also affect Texans."[144] By asserting jurisdiction rather than dismissing these cases, U.S. courts can further the interest of comity in relationships abroad while conserving judicial resources at home.

VII. FNC DISMISSAL AND ISSUE PRECLUSION IN JUDGMENT ENFORCEMENT ACTIONS: A PROPOSAL

U.S. courts can expect a wave of cases formerly dismissed on FNC grounds to return as enforcement actions, particularly if U.S. courts conducting FNC analyses elect not to consider jurisdictional legislation, such as blocking statutes, in Latin American countries.

140. *Id.* at 677 (Doggett, J., concurring).

141. *Id.*

142. *Id.* at 687–88; *see also* Hilton v. Guyot, 159 U.S. 113 (1895). In *Hilton*, the Supreme Court determined that justice is better served by extending adjudicatory comity to the judgment of a foreign court, rather than permitting the re-litigation of the merits of the matter in a domestic court through a full exercise of its admitted jurisdiction to do so. *See id.* at 158 ("[W]here there is nothing to show . . . why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.").

143. *Castro Alfaro*, 786 S.W.2d at 687.

144. *Id.* at 689.

Currently there is no universal system used to evaluate the enforceability of non-U.S. judgments in the United States.[145] This article proposes a system to deal with those cases previously dismissed from U.S. courts on FNC grounds. As stated above, in transnational litigation matters, U.S. courts should assert jurisdiction in the state where the defendant resides or where the defendant has at least the requisite minimum contacts with the state. Furthermore, courts should not permit cases previously dismissed from U.S. courts on the basis of FNC to boomerang back when this allows defendant-corporations to avoid paying foreign money judgments by alleging shortcomings in the foreign court proceedings. The boomerang loophole can be closed by applying the principles of collateral estoppel to preclude defendant-corporations from raising issues of jurisdictional fitness during enforcement proceedings where the defendant-corporations have previously moved for, and been granted, an FNC dismissal from a U.S. court.

By filing a motion for dismissal on FNC grounds, defendants agree to participate in proceedings that may not offer the same rights and amenities offered by litigation in a U.S. court. The fact that the law of an alternative jurisdiction—here, a foreign court—is less favorable to the litigant should not be accorded any weight in deciding whether to dismiss on FNC grounds, provided that *some* remedy is afforded in the foreign country.[146] Thus, defendants who are successful in their FNC motions, but later lose in a foreign venue,

145. There is, however, a system to deal with foreign arbitration judgments drawn from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, now codified at 9 U.S.C. § 201 et seq. (2007). In addition, others have set forth their views. *See, e.g.*, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, tit. III, §§ 1–2, 1972 O.J. (L 299) 32, 37–39.

146. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981). The threshold issue of an alternative forum's suitability is determined by a two-prong test: (1) there must be personal and subject matter jurisdiction over the defendant in the foreign court, and (2) there must be assurances that the action will not be barred by a statute of limitations.

There is a rare "no remedy at all" exception to this test where the plaintiff resides in a foreign country whose courts are ruled by a dictatorship, such that there is no independent judiciary or due process of law. *Id.* An example of this exception is *Phoenix Can. Oil Co. Ltd. v. Texaco, Inc.*, in which the alternative forum, Ecuador, had no independent judiciary and was controlled by a military dictatorship at the time of the case. 78 F.R.D. 445, 455 (D. Del. 1978); *see also* Rasoulzadeh v. Associated Press, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (applying the exception because plaintiffs "would probably be shot" if they returned to Iran); Canadian Overseas Ores Ltd. v. Compania de Acero Del Pacifico S.A., 528 F. Supp. 1337, 1342 (S.D.N.Y. 1982) (Chilean military junta threatened independence of the judiciary).

should be collaterally estopped from claiming that the foreign court proceeding failed to offer these rights and amenities in a subsequent enforcement proceeding before a U.S. court.

Some states have adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) to give effect to the judgments of other states and territories.[147] However, the UFMJRA also provides nine reasons why a U.S. court can or must reject a foreign money-judgment. Section 4(a) of the Act sets forth the mandatory grounds for non-recognition: (1) the foreign court did not provide impartial tribunals or procedures compatible with the requirements of due process of law, (2) the foreign court did not have personal jurisdiction over the defendant, and (3) the foreign court did not have jurisdiction over the subject matter. Additionally, section 4(b) of the Act provides six discretionary grounds for non-recognition: (1) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend, (2) the judgment was obtained by fraud, (3) the cause of action on which the judgment is based is repugnant to the public policy of the state, (4) the judgment conflicts with another final and conclusive judgment, (5) the proceedings in the foreign court are contrary to an agreement between the parties under which the dispute in question was to be settled, and (6) jurisdiction is based solely on personal service and the foreign court was a seriously inconvenient forum for the trial of the action.[148]

Following a successful FNC dismissal, the defendant in a judgment enforcement hearing should be collaterally estopped from arguing all grounds for non-recognition except for the discretionary reasons listed in section 4(b) provisions (2), (4), and (5). In other words, the foreign judgment should be enforced unless a defendant can show that the judgment was obtained fraudulently, or that the matter being litigated was concluded by another verdict or settlement. The rationale for barring the defendant from raising any of the

147. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (drafted by the Ntl. Conf. of Commissioners on Uniform State Laws (1962)). UFMJRA has been adopted in twenty-eight jurisdictions. Because there is a trend toward adoption of the Act in the States, this paper does not consider the factors for foreign judgment enforcement in states not adopting the Act. For an overview of the common law principles in this area, see *Hilton v. Guyot*, 159 U.S. 113 (1895).

148. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT at § 4(b)(1)–(6).

other objections, mandatory and discretionary, is discussed in the sections below.

A. Section 4(a)(1): No Impartial Tribunals or Due Process of Law

The first justification for not enforcing a foreign money judgment under the UFMJRA involves a situation where there are no impartial tribunals or no due process of law. However, the process of receiving an FNC dismissal should collaterally estop defendants from raising this issue in an enforcement action. To understand this reasoning, consider first the plaintiff's options in opposing FNC dismissal. One defense against an FNC dismissal, often called the "no remedy at all" exception, occurs "where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law."[149] However, this exception "applies only in 'rare circumstances,'"[150] perhaps because of the heavy burden courts place on plaintiffs to demonstrate the lack of due process. Presumably, in all other cases, a court's refusal to grant the "no remedy at all" exception is tantamount to a finding that impartial tribunals and due process of law exist in the alternative forum.

In contrast, a defendant in an enforcement hearing who claims that the alternative forum has denied due process of law has a relatively low burden to overcome. Many U.S. courts rely on the provision of the Restatement (Third) of Foreign Relations Law,[151] which states: "Evidence that the judiciary was dominated by the political branches of government . . . would support a conclusion that the legal system was one whose judgments are not entitled to recognition."[152] Thus, a U.S. court can conceivably find that a foreign forum provides sufficient due process to grant a defendant's motion for FNC dismissal, but not enough to enforce an adverse judgment against the defendant. In essence, some foreign countries, while not dictatorships, have a judiciary dominated by the legislative or executive branches. This apparently affords sufficient due process to dis-

149. Shiley Inc. v. Super. Ct., 6 Cal. Rptr. 2d 38, 43 (Ct. App. 1992) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981)).

150. *Id.*

151. *See, e.g.*, Films by Jove, Inc. v. Berov, 250 F. Supp. 2d 156, 207–08 (E.D.N.Y. 2003).

152. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482, cmt. b (1987).

miss the case from U.S. courts but not enough due process to enforce judgments. Many Latin American countries fall somewhere within this category due to the lack of an independent judiciary.[153] Courts should work to close this loophole, which essentially allows transnational corporations to act with complete immunity in developing countries.

In closing this loophole, there are three ways to address the "no remedy at all" exception. First, U.S. courts could lessen the plaintiff's burden in establishing the applicability of the "no remedy at all" exception. The courts could lower the standard for showing a lack of due process from the current requirement—"a country with a dictatorship"—to the Restatement standard that requires evidence of a judiciary dominated by the political branches of government. Second, U.S. courts could increase the burden on the defendant to show the lack of due process at the judgment enforcement hearing from the current Restatement standard to a showing that the country is governed by a dictatorship. Ideally, the burden of the defendant and the burden of the plaintiff should be essentially equal. Finally, U.S. courts could simply apply principles of collateral estoppel to bar defendants from arguing that the alternative forum afforded "no due process" after a successful FNC dismissal.

B. Section 4(a)(2): No Personal Jurisdiction over the Defendant

While a lack of personal jurisdiction over the defendant in the foreign court is mandatory grounds for not enforcing a foreign money judgment under the UFMJRA, this should be a non-issue where the defendant has previously been granted an FNC dismissal. In or-

153. Commentators have described the lack of stability and independence of many Latin American courts. *See* Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987) (discussing ineffective attempts to develop an independent judiciary in Latin America and suggesting that only a greater commitment to the rule of law will produce judicial independence); *see also* T. Leigh Anenson, Note, *For Whom the Bell Tolls . . . Judicial Selection by Election in Latin America*, 4 SW. J. L. & TRADE AM. 261 (1997) (criticizing Latin America's current judicial appointment system and arguing that an elected judiciary would create a stronger, more independent judiciary for Latin America); Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353 (2000).

In April 2005, just four months after Ecuador's President and his supporters in Congress had fired twenty-seven of the court's thirty-one members for backing a failed effort to impeach the President, the President dissolved his country's supreme court. *See* Juan Forero, *Ecuador's President Vows to Ride Out Crisis Over Judges*, N.Y. TIMES, Apr. 18, 2005, at A12.

der for an FNC dismissal to be granted, the defendant must be "amenable to process in the other jurisdiction."[154] Essentially, the defendant agrees to be subject to personal jurisdiction in the foreign court. For example, in *Delgado v. Shell*, one of the Banana Cases dismissed on FNC grounds, the court held that personal jurisdiction is a requirement for dismissal, found such jurisdiction, and accordingly dismissed.[155] Under the principles of collateral estoppel, the issue of the foreign court's personal jurisdiction was established by the U.S. court granting an FNC dismissal. Accordingly, defendants have either waived their objection to personal jurisdiction or should be barred under principles of collateral estoppel from raising the issue in a judgment enforcement action.

C. Section 4(a)(3): No Subject Matter Jurisdiction over the Claim

Along the same lines, an FNC dismissal should collaterally estop defendants from making a section 4(a)(3) subject matter jurisdiction argument at a judgment enforcement hearing. After all, an FNC dismissal "would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."[156] Thus, by requesting an FNC dismissal, the right to raise the issue of subject matter jurisdiction should be deemed waived or barred.

D. Section 4(b)(1): Defendant Did Not Receive Adequate Notice

Courts should have discretion to preclude defendants who win an FNC dismissal from invoking a section 4(b)(1) argument at a judgment enforcement hearing. A defendant fighting a drawn-out FNC battle in a U.S. court and arguing for a dismissal to the foreign court has actual notice a proceeding in that foreign court may occur in the future. There may be a situation, however, where a defendant is not properly served with notice of the hearing and is unaware of the date of the proceeding. On the other hand, if the plaintiff can show a defendant had some form of notice, then the U.S. court should enforce the judgment.

154. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

155. Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1351 (S.D. Tex. 1995).

156. *Piper Aircraft*, 454 U.S. at 255.

E. Section 4(b)(3): Enforcement of Foreign Judgment Contravenes Public Policy

Given that public policy considerations form part of the analysis in a motion for dismissal on FNC grounds, courts should consider whether the plaintiff's victory in the alternative forum would contravene public policy in the U.S. jurisdiction *before* granting the FNC dismissal. At a subsequent enforcement hearing, courts should preclude defendants from asserting that enforcement of the judgment violates public policy. Even if the dismissing court has failed to consider the policy result of a foreign judgment in the plaintiff's favor, the defendant should have considered this possibility when deciding whether to move for FNC dismissal. This judgment enforcement hearing is not the first time the case has appeared before a U.S. court; by moving for FNC dismissal, the defendant has deliberately chosen to forego the protections of American public policy by moving the action to a foreign court. It would be fundamentally unfair to both allow the defendant to assume voluntarily these risks up front, while still protecting the defendant when these same risks eventually materialize.

F. Section 4(b)(6): Foreign Court Was a Seriously Inconvenient Venue

Although an inconvenient venue is grounds for discretionary non-enforcement of a foreign money judgment, an FNC dismissal amounts to a determination that the foreign court is a sufficiently convenient venue. Once a court determines a foreign venue is available, it must then determine whether a balancing of the private and public convenience factors weighs in favor of litigation in the alternate forum.[157] The United States Supreme Court first outlined these balancing test factors in *Gulf Oil Corp. v. Gilbert*, noting:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case

157. *Id.* at 247–52.

> easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.[158]

Nearly all the *Gilbert* factors deal with convenience. In essence, when a court engages in the *Gilbert* analysis, weighs the relative merits of available forums, and finds that an FNC dismissal is appropriate, the court also determines, at the same time, that the foreign court is actually *more* convenient than the domestic venue. A federal district court that dismissed one of the Banana Cases on FNC grounds stated that when FNC dismissal is sought, "the court must determine . . . what forum will best serve the convenience of the parties and the ends of justice."[159] Because an FNC dismissal equates to a finding that the foreign court best serves the convenience of both parties, defendants should be collaterally estopped from arguing that the foreign court was a seriously inconvenient venue.

If U.S. courts bar objections to enforcement through collateral estoppel, defendants are by no means left without recourse in an enforcement action. Defendants may still argue that the foreign judgment was obtained by fraud, or that it conflicts with another final judgment or settlement agreement. Furthermore, defendants could also argue against enforcement when the proceeding in the foreign court was substantially different from the process envisioned by the U.S. court that granted the FNC dismissal. For example, this provision might apply in the event of regime change in the foreign coun-

158. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). A more recent Supreme Court case, *American Dredging Co. v. Miller*, favorably discusses these *Gilbert* factors in its treatment of FNC. *See* 510 U.S. 443, 448–49 (1994). The Court describes the erosion of the actual *Gilbert* holding and the resulting limited vitality of FNC dismissal in federal courts: "*Gilbert* held that it was permissible to dismiss an action brought in a District Court in New York by a Virginia plaintiff against a defendant doing business in Virginia for a fire that occurred in Virginia. Such a dismissal would be improper today because of the federal venue transfer statute, 28 U.S.C. § 1404(a): 'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' . . . As a consequence, the federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad." *Id.* at 449 n.2. Accordingly, courts continue to apply the *Gilbert* factors to FNC analysis involving forums in other countries. *See, e.g.*, Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 673 (S.D. Tex. 2004) ("[F]ederal courts consider forum non conveniens motions under the analytical framework established in [*Gilbert*] and its progeny."); Canales Martinez v. Dow Chem. Co., 219 F. Supp. 2d 719, 725 (E.D. La. 2002).

159. Delgado v. Shell Oil Co., 322 F. Supp. 2d 798, 806 (S.D. Tex. 2004).

try or misinformation provided to the U.S. court for which the defendants were not responsible.

VIII. CONCLUSION

In Latin America, there is a trend toward holding transnational companies legally accountable for activities that cause damage in Latin America. Latin American courts have developed new causes of action, enforced blocking statutes, and rendered large money verdicts against U.S. companies. This means that an FNC dismissal in the U.S. will not necessarily signify the end of an action. As plaintiffs achieve victories in Latin American courts, more judgment enforcement cases are likely to find their way to U.S. courts.

U.S. courts need to respond to these developments by closing the enforcement loophole between an FNC dismissal and the subsequent foreign money judgment enforcement action. Otherwise, significant judicial resources will be needlessly spent on boomerang litigation, and fundamental unfairness may result. Transnational litigation is not a mere passing fad; it is the future. Now is the time for the courts to engage in a more comprehensive analysis of the pitfalls of boomerang litigation with an eye to developing workable solutions.